# General Electric International Inc v Mohanjit Lubana & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–135–08 OF 2016
AZIZAH NAWAWI J
23 MAY 2018

*Civil Procedure — Judicial review — Application for — Dismissal of first respondent from employment by applicant — Industrial Court found there was no redundancy — Applicant filed judicial review against decision of Industrial Court — Whether there was actual redundancy*

*Labour Law — Employment — Redundancy — Dismissal of first respondent from employment by applicant — Industrial Court found there was no redundancy — Whether there was actual redundancy*

The first respondent commenced employment with the applicant with effect from 1 June 2010. Sometime around 21 February 2013, the first respondent was informed that due to the global simplification effort, the applicant had decided to combine Australia and South-East Asia to form the Rest of Asia ('the ROA') business unit, resulting in making the first respondent's role to be redundant. The first respondent failed to secure an alternative role within the applicant. Subsequently, the applicant paid a sum of RM222,812.03 inclusive of all contractual dues together with a redundancy package to the first respondent. The dispute regarding the first respondent's dismissal by the applicant was referred to the Industrial Court ('the second respondent') for adjudication. The chairman of the second respondent handed down the award on 28 April 2016 ('the award'). The second respondent ruled that there was no actual redundancy situation to justify the first respondent's dismissal. The second respondent further ordered the applicant to pay the first respondent the sum of RM1,031,999.97 less statutory deductions, if any. Dissatisfied with the decision, the applicant filed the present application for judicial review, seeking the following orders from the court: (a) an order of certiorari to quash the decision of the second respondent through the award; and (b) an order for all further proceeding to enforce or execute the award and all proceeding in the Industrial Court's suit to be stayed pending the final decision by the court for the substantive application. The issue for consideration was whether there was actual redundancy which necessitated the first respondent to be retrenched.

**Held**, allowing the applicant's application with cost and quashing the award:

(1) The second respondent had made a finding of fact that the duties and responsibilities of the first respondent had not ceased or diminished but

had been taken over by George Garden. But George Garden was not based in Malaysia, he was based in Melbourne, Australia. Therefore, for all intent and purpose, the duties and responsibilities of the first respondent no longer existed in Malaysia, but had been consolidated into ROA, based in Melbourne, Australia. Based on the above finding, the second respondent had failed to take a relevant consideration, namely that the duties and responsibilities of the first respondent had ceased to exist in Malaysia, thereby causing redundancy in Malaysia leading to the retrenchment of the first respondent (see paras 19 & 21–22).

**[Bahasa Malaysia summary**

Responden pertama mula bekerja dengan pemohon berkuat kuasa dari 1 Jun 2010. Sekitar 21 Februari 2013, responden pertama diberitahu bahawa akibat kepada usaha penyederhanaan global, pemohon telah memutuskan untuk menggabung Australia dan Asia Tenggara untuk membentuk unit perniagaan Rest of Asia ('ROA'), mengakibatkan jawatan responden pertama menjadi berlebihan. Responden pertama gagal untuk mendapatkan jawatan alternatif dalam pemohon. Kemudiannya, pemohon membayar sejumlah RM222,812.03 termasuk kesemua kontraktual yang kena dibayar bersama dengan pakej untuk pekerja lebihan kepada responden pertama. Pertikaian berkaitan pembuangan kerja responden pertama oleh pemohon dirujuk kepada Mahkamah Perusahaan ('responden kedua') untuk penghukuman. Pengerusi responden kedua telah memberikan award pada 28 April 2016 ('award tersebut'). Responden kedua memutuskan bahawa tidak terdapat keadaan berlebihan sebenar untuk menjustifikasikan pembuangan kerja responden pertama. Responden kedua selanjutnya memerintah pemohon untuk membayar kepada responden pertama sejumlah RM1,031,999.97 tolak potongan statutori, jika ada. Tidak berpuas hati dengan keputusan, pemohon memfailkan permohonan ini untuk semakan kehakiman, dengan memohon perintah-perintah berikut daripada mahkamah: (a) perintah certiorari untuk membatalkan keputusan responden kedua melalui award; dan (b) perintah untuk kesemua prosiding selanjutnya untuk menguatkuasa atau menyempurnakan dan kesemua prosiding award dalam tindakan Mahkamah Perusahaan ditangguh sementara menunggu keputusan akhir oleh mahkamah untuk permohonan substantif. Isu untuk pertimbangan adalah sama ada terdapat berlebihan sebenar yang memerlukan responden pertama dibuang kerja.

**Diputuskan**, membenarkan permohonan pemohon dengan kos dan membatalkan award:

(1) Responden kedua telah membuat dapatan fakta bahawa tugas dan tanggungjawab responden pertama tidak terhenti atau dikurangkan tetapi diambil alih oleh George Garden. Tetapi George Garden bukan berpusat di Malaysia, dia berpusat di Melbourne, Australia. Oleh itu,

untuk kesemua niat dan tujuan, tugas dan tanggungjawab responden pertama tidak lagi wujud di Malaysia, tetapi telah digabungkan ke dalam ROA, berpusat di Melbourne, Australia. Berdasarkan dapatan di atas, responden kedua telah gagal untuk mengambil pertimbangan relevan, iaitu bahawa tugas dan tanggungjawab responden pertama telah tidak wujud di Malaysia, dengan itu menyebabkan berlebihan di Malaysia membawa kepada pembuangan responden pertama (lihat perenggan 19 & 21–22).]

**Notes**

For a case on application for judicial review see, 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

For a case on redundancy see, 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1396–1399.

**Cases referred to**

*Dynacraft Industries Sdn Bhd v Kamaruddin bin Kana Mohd Sharif & Ors* [2012] 6 MLJ 453; [2012] 9 CLJ 21, FC (refd)

*ER Sutton v Revlon Overseas Corporation Ltd* [1973] IRLR 173 (refd)

*Jupiter Securities Sdn Bhd v Edmund Chang* [2009] 2 LNS 0057, IC (refd)

*Jupiter Securities Sdn Bhd v Mohammad Mustapha Mohd Ariffin* [2010] ILJU 719, IC (refd)

*Lim Yu Chee v Staedtler Marketing Sdn Bhd* [2011] 2 LNS 1638; [2012] 1 ILJ 296, IC (refd)

*Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

*Senjuang Sdn Bhd v Munirah Mad Nor* [2015] ILR 471, IC (refd)

*Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535; [1997] 1 LNS 99, HC (refd)

*Yong Hon Cheong (Zaid Ibrahim & Co) for the applicant.*

*S Muhendaran (K Shankar with him) (Shaharudin Sham Sunder & Partners) for the first respondent.*

**Azizah Nawawi J:**

APPLICATION

**[1]** This is the applicant's application for judicial review, seeking the following orders from the court:

(a) an order of certiorari to quash the decision of the second respondent through the award dated 28 April 2016, which was received by the applicant on 6 July 2016; and

(b) an order for all further proceedings to enforce or execute the award dated 28 April 2016 and all proceedings in the Industrial Court's suit to be stayed pending the final decision by the court for the substantive application.

**[2]** The grounds of the application are as follows:

(a) that the second respondent ('the Industrial Court') has erred in law and/or failed to take into account the relevant considerations in its decision making process;

(b) that the Industrial Court has failed to take into account the applicant's managerial prerogative to reorganise, restructure and redistribute business;

(c) that the Industrial Court has failed to take into account that when the sole position of 'General Manager Industrial Solutions Rest of Asia/Pacific Asia' was created, the original position of the first respondent in Malaysia was abolished and no longer existed as the said position was based in Australia;

(d) the Industrial Court has failed to take into account that there is an accepted principle in law wherein an employer may terminate the services of its employee on the basis that the employees are a surplus if it can be demonstrated that lesser employees are required to do the same amount of work; and

(e) that the Industrial Court has erred when it decided that the dismissal of the first respondent was done mala fide without any evidence.

**[3]** Having considered the application and the submission of the parties, this court has allowed the application with costs.

THE SALIENT FACTS

**[4]** The first respondent is an American citizen who had commenced employment with the applicant as the ASEAN Regional Industrial Leader with GE Solutions in Malaysia with effect from 1 June 2010.

**[5]** Sometime around 21 February 2013, the first respondent was informed that due to the global simplification effort, the applicant had decided to combine Australia and South East Asia to form the rest of Asia ('the ROA') business unit, resulting in making the first respondent's role to be redundant.

**[6]** The first respondent was also informed that he was eligible to apply for vacant positions within the applicant but any applications made will be subject to a normal selection process. In the event that the first respondent fail to secure

an alternative role, the first respondent's employment contract will be terminated with effect from 20 March 2013.

**[7]** The first respondent subsequently failed to secure an alternative role within the applicant. The applicant paid a sum of RM222,812.03 inclusive of all contractual dues together with a redundancy package to the first respondent.

**[8]** The first respondent filed a complaint with the Ministry of Human Resources and the Minister then referred the dispute to the second respondent, the Industrial Court for adjudication.

**[9]** The chairman of the second respondent handed down an award on 28 April 2016 and the applicant's solicitors received the award on 6 July 2016. The Industrial Court ruled that there was no actual redundancy situation to justify the first respondent's dismissal.

**[10]** Through the award, the second respondent had ordered the applicant to pay the first respondent the sum of RM1,031,999.97 less statutory deductions, if any.

**[11]** Hence, the applicant proceeded to file this application for judicial review on 5 August 2016 to challenge the decision of the Industrial Court.

## THE FINDINGS OF THE COURT

**[12]** The Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 has set out the function of this court in an application for judicial review and the correct test to be applied in reviewing findings of fact made by the Industrial Court, to be as follows:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. *The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinize the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.*
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> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj*

*Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, *it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.*

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235, *National Union Of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong And another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 95). However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that *where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review*. (Emphasis added).

**[13]** Bearing the principles enunciated in *Ranjit Kaur*'s case, I will now deal with the core issue raised by the applicant, that is, whether there is actual redundancy which necessitates the first respondent to be retrenched. If the answer is no, then the first respondent is dismissed without just cause and should be compensated.

**[14]** The applicant submits that the relevant case on the issue of redundancy is *ER Sutton v Revlon Overseas Corporation Ltd* [1973] IRLR 173, where the English National Industrial Relations Court has held as follows:

Under s 1(2)(b) of the Redundancy Payments Act 1965, *the requirements of a business for employees to carry out work of a particular kind can diminish in two ways.*

> *The work itself may cease or diminish, alternatively a reorganization or mechanization may enable the same works to be done by fewer employees. This is true of the present case. The reorganization of the respondent's business was such that its requirement for a separate and additional employee to carry out the work of a chief accountant had ceased and because the whole of the duties previously performed by the Appellant was absorbed by the remaining staff and not taken over by someone from outside, the Tribunal had rightly held that the employee's dismissal fell within the definition of redundancy*. (Emphasis added).

**[15]** Therefore, the applicant submits that in this case the applicant had made a business decision to combine Australia and South East Asia business to form Rest of Asia ('ROA') in order to be more efficient and competitive globally. The consolidated role was moved out of Malaysia and resided in Australia. The new consolidated post in Australia was held by George Gerdan in Melbourne, Australia.

**[16]** Therefore, premised on *ER Sutton*'s case, which had been applied in various Malaysian cases, namely *Lim Yu Chee v Staedtler Marketing Sdn Bhd* [2012] 1 ILJ 296; *Senjuang Sdn Bhd v Munirah Mad Nor* [2015] ILR 471; *Jupiter Securities Sdn Bhd v Edmund Chang* [2009] 2 LNS 0057; *Jupiter Securities Sdn Bhd v Mohammad Mustapha Mohd Ariffin* [2010] ILJU 719; *Tuan Syed Hashim bin Tuan Long v Esso Production Malaysia Inc* [1998] 5 MLJ 535; [1997] 1 LNS 99 the applicant submits that there is redundancy as there had been a consolidation of the Australia and South East Asia business to form the ROA based in Melbourne, Australia. Added to that there is no replacement of the position of the first respondent in Malaysia by anyone.

**[17]** However, the first respondent relied on the decision of the Federal Court in *Dynacraft Industries Sdn Bhd v Kamaruddin bin Kana Mohd Sharif & Ors* [2012] 6 MLJ 453 ; [2012] 9 CLJ 21, which held that redundancy was not proven where the claimant's job functions were taken over by other employees:

> [41] We cannot accept that submission made on behalf of the appellant. As found by the learned High Court judge, the evidence of Chow Heng Khow and Ch'ng Beng Tatt were not challenged by the appellant. Chow Heng Khow's evidence shows that upon his dismissal, his job was taken over by Ann Lin (Cow 2). In respect of Ch'ng Beng Tatt, upon his dismissal his job functions were taken over by Bill Fulton assisted by the engineer YF Yap. Consequently, the Court of Appeal held (and in our view rightly) that with the unchallenged evidence of Chow Heng Khow and Ch'ng Beng Tatt that their respective jobs and workload were taken over by two other employees, and not eliminated or extinguished, redundancy was not proven, as mere reorganisation was insufficient to justify their retrenchment which was correctly held to be without just cause or excuse. In this regard in *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361; [1999] 4 CLJ 155, Shaik Daud JCA speaking for the Court of Appeal said at (p 364–365 (MLJ); p 160 (CLJ)):
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> On redundancy it cannot be gainsaid that the appellant must come to the court

with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See *Chapman & Ors v Goonvean & Rostowrack China Clay Co Ltd* [1973] 2 All ER 1063). It is our view that merely to show evidence of a re-organization in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. After his dismissal his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant.

**[18]** The first respondent then submits that by correctly applying *Dynacraft*'s case, the Industrial Court has held that the applicant has failed to prove actual redundancy as the duties and responsibilities of the first respondent had been taken over by George Gerdan, as can be seen from para 36 of the award:

The *company failed to prove actual redundancy in this case. From the evidence adduced, the court finds that there was no actual redundancy situation to justify the claimant's dismissal. The evidence adduced by the respondent merely showed that the duties and responsibilities of the claimant had been taken over by George Gerdan and the claimant's duties and responsibilities had not ceased or diminished.* The evidence adduced before the Court shows that the Industrial Solution Department in Malaysia did not close down. The court is inclined to agree with the claimant's submission that the company's decision to reorganize and to combine Australia and South East Asia as one unit did not lead to the cessation or elimination of the duties and responsibilities of the Claimant of the ASEAN Regional Industrial Leader of the Industrial Solutions Department. On the contrary, the submissions of the respondent that a genuine redundancy situation did arose albeit that claimant's role was ultimately absorbed into the much larger role of General Manager ROA are without merits. *The facts do not show that the kind of work the claimant was assigned to neither ceased or diminished as the Company had assigned the Claimant's duties and responsibilities to George Gerdan.* In the circumstances, the respondent failed to prove actual redundancy which necessitated the claimant's retrenchment. (Emphasis added.)

**[19]** The Industrial Court has made a finding of fact that the duties and responsibilities of the first respondent had not ceased or diminished but had been taken over by George Gerdan. But George Gerdan is not based in Malaysia, but in Melbourne, Australia. Therefore, for all intent and purpose, the duties and responsibilities of the first respondent no longer exists in Malaysia, but had been consolidated into the ROA, based in Melbourne, Australia.

**[20]** In *Dynacraft*'s case, the duties and responsibilities of the claimants were taken over by other persons, within Malaysia. There is no issue in that case that the duties and responsibilities of the claimants were consolidated into a bigger role and moved overseas.

**[21]** Therefore, I am of the considered opinion that as far as Malaysia is concern, the duties and responsibilities of the first respondent had ceased to exist. What happen is that as part of its global simplification effort, there is now a Rest of Asia (ROA) business unit based in Melbourne, Australia. The ROA unit is a combination of the SEA region and Australia. The evidence of applicant's witnesses is that nobody in Malaysia had taken the duties and responsibilities of the first respondent in Malaysia. Added to that, the job scope of General Manager, ROA is wider as it encompasses not just ASEAN region but includes Australia as well. Further, the ASEAN job focus mainly on commercial, whereas Australia has manufacturing and service workshop.

**[22]** In the premise, I am of the considered opinion that the Industrial Court has failed to take a relevant consideration, namely that the duties and responsibilities of the first respondent had ceased to exist in Malaysia, thereby causing redundancy in Malaysia leading to the retrenchment of the first respondent and was paid retrenchment benefits. The applicant's application is allowed with cost and the said award is hereby quashed.

*Applicant's application allowed with costs; award quashed.*

Reported by Dzulqarnain Ab Fatar